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Supreme Court, U. S.
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JUN 5 1973

MICHAEL RODAK, JR., CLERK

in the Supreme Court of the United States

TERM, 1973

NO. 72-1635

THE OHIO CASUALTY GROUP,
Petitioner,

vs.

JAMES C. PARRISH, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF THE STATE OF FLORIDA

JOHN R. BERANEK of
JONES, PAINE & FOSTER, P.A.
Post Office Drawer E
West Palm Beach, Florida 33402
Attorneys for Petitioner

MIAMI REVIEW — 371-4853 — 377-3721

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Supreme Court
of the
United States

TERM, 1973

NO. _____

THE OHIO CASUALTY GROUP,
Petitioner,

vs.

JAMES C. PARRISH, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, THE OHIO CASUALTY GROUP, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Florida rendered on March 7, 1973.

OPINIONS AND ORDERS BELOW

The opinion of the First District Court of Appeal of Florida of April 4, 1972, reported at 260 So.2d 550 (3d D.C.A. Fla. 1972), is the first decision of an appellate court involved in this matter. Thereafter, the matter was taken before the Supreme Court and by opinion of the Florida Supreme Court of January 22, 1973, not yet reported, the Supreme Court of Florida denied certiorari. Thereafter, the Florida Supreme Court denied a petition for rehearing filed by petitioners herein of March 7, 1973. This order denying rehearing is not reported. Copies of each of the aforementioned decisions are made a part of the attached appendix.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C.A. §1257. The grounds for jurisdiction are that the petitioner has been deprived of property without procedural or substantive due process of law. Under Florida Appellate Rule 1.3, the decision of the Florida Supreme Court was rendered on March 7, 1973, the date of the denial of petitioner's petition for rehearing before the Florida Supreme Court.

QUESTIONS PRESENTED

Whether petitioner insurance carrier was deprived of the constitutional guarantee of due process by lack of a timely and proper notice of the confenence at which petitioner's rights to equitable proration of the settlement amount were considered?

Whether the hearing procedure met the standards of due process in that no witnesses were presented, no evidence taken and due to the Court's deciding of all issues based solely on the argument of counsel?

Whether the guarantee of due process of law was violated by the absence of subject matter jurisdiction?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment of the United States Constitution is involved. In pertinent part, the Fourteenth Amendment provides:

> "Nor shall any state deprive any person of life, liberty or property, without due process of law. . . ."

Incidentally involved is Chapter 440 of the Florida Statutes which governs the Workmen's Compensation Law of the State of Florida.

STATEMENT OF THE CASE

This case arises under the Workmen's Compensation Law of Florida as set out in Florida Statutes, Chapter 440. The general scheme of workmen's compensation law in Florida is that each employer obtains workmen's compensation insurance coverage through an insurance carrier. When an employee is injured in the course and scope of his employment, then, the carrier pays certain scheduled disability benefits and medical expenses. The system functions without regard to the fault or negligence of the employer or the employee.

In a situation where an employee is working and is injured by the negligence of a third party (other than the employer), the injured employee still retains all common law rights to sue the third party in court and recover judgment for all damages. The injured employee is also entitled to receive all the workmen's compensation benefits due him under the law. The resulting double recovery is abrogated by a statutory provision allowing the workmen's compensation insurance carrier to file a "Notice of Payment of Compensation Benefits" which constitutes a *lien* on the recovery in the common law action. This notice of payment, often referred to as a "compensation lien," is actually filed in the personal injury lawsuit between the injured plaintiff who is also the compensation claimant and the negligent third party tortfeasor. In this respect pertinent Florida Statutes relating to workmen's compensation in Florida are made a part of the appendix herein. These Statutes include §440.11(1),(2) and 440.39 (1),(2),(3)(a) and 3(b).

In practice, the workmen's compensation carrier pays benefit to the injured employee and files its lien in the suit brought by the injured employee against the third party tortfeasor. If the common law action results in settlement or judgment for the plaintiff, then the Court hearing the personal injury case make a pro rata equitable distribution of the amount recovered between both the plaintiff and the compensation carrier. See, §440.39 (3)(a). In effect, the carrier is subrogated to the employee's rights against the negligent third party and shares in the recovery on an equitable basis.

Workmen's compensation claims in Florida are generally handled by an administrative board known as the

Florida Industrial Relations Commission. Workmen's compensation liens are not within the jurisdiction of this administrative body, but instead are handled exclusively within the jurisdiction of the Circuit Court which is the initial trial court in the Florida system. The Circuit Court also hears and determines personal injury cases.

The petitioner, THE OHIO CASUALTY GROUP, was a workmen's compensation insurance carrier which filed its lien in a common law action. The common law case was a personal injury action in which the injured plaintiff was receiving workmen's compensation benefits arising out of a single accident occurring on the job. The respondents in this certiorari matter are the original plaintiff in the personal injury action and all other defendants in the action. The parties are thus the petitioner who was a workmen's compensation lienor in the suit and the plaintiffs and defendants in the suit. The petitioner seeks review by certiorari of an order of the Florida Supreme Court affirming an order of equitable proration of the proceeds of an anticipated settlement in the personal injury action. The amount awarded was $20,000.

The personal injury suit involved an accident in which a minor plaintiff was injured on September 7, 1970, while in the course of his employment. His employer had workmen's compensation insurance with THE OHIO CASUALTY GROUP. Compensation and medical benefits were immediately paid by the carrier. On September 25, 1970, the personal injury action was commenced against various defendants, all alleged to be third party tortfeasors. On January 26, 1971, OHIO CASUALTY, pursuant to the provisions of §440.39, filed its "Notice of Workmen's Compensation Carrier's Claim of Lien."

After extensive discovery and preparation the personal injury action was specially set for a jury trial to occur on Monday, August 31, 1971. On August 20, 1971, the Friday before the Monday of the trial, an emergency conference occurred before the Trial Judge. Present at this conference were the various attorneys representing the parties in the personal injury action and the attorney for the workmen's compensation carrier. The transcript of the entire conference is 45 pages long and reflects the following.

The parties to the personal injury suit were attempting to settle the case but did not want to do so until they found out how much money the Circuit Judge was going to allow the compensation lienor to recover. The Trial Judge did not feel he should express such an opinion in the absence of an attorney representing the insurance carrier and, therefore, counsel for the various parties called the office of the attorney representing THE OHIO CASUALTY GROUP who was a Mr. Laurence P. Kuvin. Mr. Kuvin was on vacation but was eventually contacted by telephone at his home. Late on the afternoon of Thursday before the conference which occurred on Friday, Mr. Kuvin was instructed to appear on the following day for a conference before the Judge. When Attorney Kuvin protested, he was instructed that it would be necessary for him to appear.

On the following day Attorney Kuvin did appear for the conference. Without notice and despite Attorney Kuvin's continued objections, the Trial Judge simply allowed all of the attorneys to talk about the case and to direct questions to one another as though they were under oath. The attorneys for the parties repeatedly stressed

the emergency nature of the matter and continually stated that they had to know immediately what the compensation lien was worth so that they could attempt a settlement and avoid the costs and trouble of proceeding with a large trial on the following Monday. Attorney Kuvin was repeatedly advised that despite his objection and despite the lack of any opportunity to present his case, a decision had to be made immediately so that the case could be settled before the Monday trial date.

No evidence was presented at the hearing and no testimony was taken. The entire Court file was referred to but was clearly never considered by the Trial Court. The actual status and purpose of the hearing was at all times uncertain. Statements were made to the effect that it was simply an "informal conference" not binding on anyone and other statements were made to the effect that the problem had to be solved immediately. The Trial Judge never announced the precise status of the conference despite specific questions in this regard directed to him by Attorney Kuvin on behalf of petitioner.

Since there was no testimony or evidence there are no real facts. The arguments of counsel disclose that the minor plaintiff had sustained extremely serious and totally disabling injuries. As of August 20, 1971, the insurance carrier had paid approximately $70,000.00 in compensation and medical benefits.

The minor plaintiff was 19 years of age at the time of the accident and based on a 20-year life expectancy, the carrier had a future liability of at least $500,000.00 in compensation and medical benefits. Thus, the compensation benefits to be paid were close to $570,000.00. The settle-

ment figure of the personal injury case, which was only tentatively in the minds of counsel for the parties, was $1.7 million dollars. This $1.7 million figure was entirely contingent upon the Trial Court's awarding the workmen's compensation insurance carrier a minimal amount of recovery as an equitable proration.

After the conference had gone on for a considerable period, the Judge simply stated that he would award $20,000.00. On August 23, 1971, the Trial Court entered an order awarding this amount of $20,000.00 to the carrier. Petitioner felt this to be grossly inadequate.

Petitioner insurance carrier appealed to the Third District Court of Florida contesting this order on equitable proration. By opinion of April 4 ,1972, the District Court affirmed the Trial Court. The District Court held that the procedure was improper but that the attorney at the conference had waived the right to assert this improper conduct.

Petitioner then sought review before the Florida Supreme Court by petition for certiorari and by direct appeal. By order of January 22, 1973, the petition was denied. The Court declined jurisdiction apparently on a finding of an absence of conflict. A petition for rehearing was denied by order of March 7, 1973. The direct appeal was not ruled upon.

The Federal questions sought to be reviewed before this Court were raised and ruled upon below as follows. In petitioner's brief to the District Court of Appeal the following point on appeal was stated:

"WHETHER ON THIS RECORD APPELLANT WAS DEPRIVED OF ITS CONSTITUTIONAL RIGHT TO PROCEDURAL DUE PROCESS OF LAW BY LACK OF TIMELY AND PROPER NOTICE OF THE SUBJECT HEARING ON EQUITABLE PRORATION, AND BY THE PROCEDURE FOLLOWED DURING THE HEARING. (Raised by assignments of error 1, 3-6, and 8-12)."

In the petition for certiorari to the Florida Supreme Court, the following points were specifically stated:

"WHETHER THE CIRCUIT COURT HAD JURISDICTION OVER THE SUBJECT MATTER TO CONSIDER AN ORAL REQUEST FOR EQUITABLE PRORATION PRIOR TO A SETTLEMENT OF THE COMMON LAW ACTION.

"WHETHER THE PROCEEDING BEFORE THE CIRCUIT COURT MET THE REQUIREMENTS OF DUE PROCESS AS REQUIRED BY THE FLORIDA AND FEDERAL CONSTITUTIONS?"

The notice of appeal to the Florida Supreme Court was as follows:

"NOTICE OF APPEAL

(NOTICE OF APPEAL FROM DISTRICT COURT TO SUPREME COURT)

"Appellant, THE OHIO CASUALTY GROUP, takes and enters its appeal to the Supreme Court of Florida to review the order of the Third District Court of Appeal of Florida, bearing date of April 4, 1972, and rendered on May 2, 1972, the date upon which appellant's petition for rehearing was denied by said Court. Said order of April 4, 1972, is contained in Book 44, at page 232 of the Official Records of the District Court of Appeal, Third District. The nature of the order appealed from is a decision initially passing upon or construing a controlling provision of the Florida or Federal Constitution."

All of the above were extensively argued on brief before the Fourth District Court of Appeal and the Florida Supreme Court. These Courts rejected all arguments and thereby held that Petitioner had not been deprived of property without due process of law.

The breach of the constitutionally protected standard of due process was not specifically raised before the Trial Court because of the absence of any meaningful hearing before that Court. The following excerpts from the record of the hearing before the Trial Court indicate that no hearing actually occurred.

"MR. DANIELS: I take it that what we are doing is sitting here discussing the problem.

"We are not having the pro rata distribution hearing, as such, today, and you simply came down here on short notice, and if there is to be a hearing, it will have to be held at a later date.

"MR. KUVIN: I assume, unless the Judge can get us to work out some sort of agreement.

* * *

"MR. DANIELS: My understanding is, here there is no more than an informal conference which we have all agreed to come to.

"Nothing is binding on anybody, and the Court is merely being generous with its time."

* * *

"MR. ADAMS: Judge, I never talked to Mr. Daniels, and I do not mean to put Larry under the gun, but we have been going night and day on this thing, and we have got witnesses and 10 days of trial and tremendous expense, and we are looking at a Monday morning, and I appreciate this situation, but I cannot quite agree with Mr. Daniels that this is something that we have got to informally do today and decide six months from now.

"We are going to be right up —

"THE COURT: Your position is, you want to settle the case with the plaintiffs.

* * *

"MR. SUDDUTH: Let me ask this on the record.

"We are here to dispose of the comp. claim?

"MR. KUVIN: Yes, I assume, Jack, if you fellows are in a quandary of whether or not to

accept whatever offer has been made to you in the third-party claim because you do not know what you are going to have to pay back on the comp. claim.

"MR. SUDDUTH: We are here on the hearing to dispose of the comp. claim through the Court because we cannot dispose of it otherwise today, correct?

"MR. KUVIN: I am here today because I was called at home yesterday and advised that Judge Falk was having a hearing at 1 o'clock today to see what we can work out or see what our thinking was on the workmen's compensation claim.

* * *

"MR. KUVIN: I will go forward, yes, because my carrier, frankly, would like to know what is facing us as far as what the Court's going to rule on."

Based on the above, it is clear that there was in fact no hearing before the Trial Court. The final statement of counsel to the effect that he would carry on with the hearing should not be construed as a waiver. This was simply a statement by counsel to the effect that he was curious as to what the Court would rule on. This referred to the evidence the Court would be accepting and not an actual advisory ruling as was being requested by opposing counsel.

It is submitted that the questions regarding due process were certainly raised at all possible levels in the Courts below.

ARGUMENT

REASONS FOR ALLOWANCE OF WRIT

The basic requisites of "due process" are that the Court entering judgment have subject matter jurisdiction and that the parties bound be given reasonable notice and an opportunity to be heard.

The procedural aspects of due process which absolutely require both notice and an opportunity to defend in an orderly proceeding before a tribunal having jurisdiction cannot be subject to question. *Anderson National Bank v. Luckett*, 321 U.S. 233, 64 S.Ct. 599, 8 L.Ed. 692; and *Link v. Wabash R. Co.*, 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734.

In this case jurisdiction over the subject matter, notice and a true hearing were simply not present. Absent these three essentials the constitutional requirements of "due process" were not met and the final judgment below must be reversed.

The Courts below lacked subject matter jurisdiction because Florida Statute §440.39 requires that there be either a "settlement" or "judgment" before the Trial Court has jurisdiction to enter an order on equitable proration. Here there was no settlement. The parties were simply trying to reach a figure at which they could agree.

There was no notice of hearing and there was in fact no hearing. No evidence was presented. No testimony was taken. The Trial Court simply picked the $20,000.00 figure out of thin air.

Neither the substantive nor the procedural aspects of due process were satisfied.

CONCLUSION

The petition for writ of certiorari should be granted and the matter reversed for further full and adequate proceedings before the Florida Courts.

Respectfully submitted,

JONES, PAINE & FOSTER, P.A.
Post Office Drawer E
West Palm Beach, Florida 33402
Telephone: (305) 833-7701

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished, by mail, EDWARD A. PERSE, ESQUIRE, of HORTON, SCHWARTZ & PERSE, 410 Concord Building, Miami, Florida 33130; PREDDY, HADDAD, KUTNER & HARDY, Concord Building, Miami, Florida 33130; SAM DANIELS, ESQUIRE, 1414 duPont Building, Miami, Florida 33131; HEADLEY & SUDDUTH, 1703 First National Bank Building, Miami, Florida 33131; and RICHARD B. ADAMS, ESQUIRE, of ADAMS, GEORGE & WOOD, Ninth Floor, Concord Building, 66 West Flagler Street, Miami, Florida 33130, this ____ day of June, 1973.

JONES, PAINE & FOSTER, P.A.

By_____
John R. Beranek

Post Office Drawer E
West Palm Beach, Florida 33402
Telephone: (305) 833-7701
Attorneys for Petitioner,
THE OHIO CASUALTY GROUP

APPENDIX

APPENDIX

440.11 EXCLUSIVENESS OF LIABILITY.—

(1) The liability of an employer prescribed in Section 440.10, Florida Statutes, shall be exclusive and in place of all other liability of such employer to any third party tort-feasor and to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter an injured employee, or his legal representative, in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee.

(2) Any employer's workmen's compensation carrier, service agent, or safety consultant shall not be liable as a third party tort-feasor for assisting said employer in carrying out said employer's rights and responsibilities under this chapter by furnishing any safety inspection, safety consultive service or other safety service incidental to the workmen's compensation or employers' liability coverage or to the workmen's compensation or employers' liability servicing contract; provided the exclusion from liability under this subsection shall not apply in any case where injury or death is proximately caused by the willful

and unprovoked physical aggression or by the negligent operation of a motor vehicle by employees, officers or directors of the workmen's compensation carrier, service agent, or safety consultant of said employer.

History.—§11, ch. 17481, 1935; CGL 1936 Supp. 5966(11); sub. §2 am. ch. 70-25; sub §1. am. ch. 71-190.

440.39 COMPENSATION FOR INJURIES WHERE THIRD PERSONS ARE LIABLE.—

(1) If an employee, subject to the provisions of the Florida workmen's compensation law, is injured or killed in the course of his employment by the negligence or wrongful act of a third party tort-feasor, such injured employee, or in the case of his death his dependents, may accept compensation benefits under the provisions of this law, and at the same time such injured employee, his dependents or personal representatives may pursue his remedy by action at law or otherwise against such third party tort-feasor.

(2) If the employee or his dependents shall accept compensation or other benefits under this law or begin proceedings therefor, the employer or, in the event the employer is insured against liability hereunder then the insurer, shall be subrogated to the rights of the employee or his dependents against such third party tort-feasor, to the extent of the amount of compensation benefits paid or to be paid as provided by subsection (3) of this section.

(3)(a) In all claims or actions at law against a third party tort-feasor, the employee, or his dependents, or those entitled by law to sue in the event he is deceased, shall sue for the employee individually, and for the use and benefit of the employer if a self-insurer, or employer's insurance carrier, in the event compensation benefits are claimed or

paid, and such suit may be brought in the name of the employee or his dependents or those entitled by law to sue in the event he is deceased, as plaintiff, or, at the option of such plaintiff may be brought in the name of such plaintiff and for the use and benefit of the employer or insurance carrier, as the case may be. Upon suit being filed the employer or the insurance carrier, as the case may be, may file in the suit a notice of payment of compensation and medical benefits to the employee or his dependents, which said notice shall be recorded and the same shall constitute a lien upon any judgment recovered to the extent that the court may determine to be their pro rata share for compensation benefits paid or to be paid under the provisions of this law, based upon such equitable distribution of the amount recovered as the court may determine, less their pro rata share of all court costs expended by the plaintiff in the prosecution of the suit including reasonable attorney's fees for plaintiff's attorney, such proration of court costs and attorney's fees to be made by the judge of the trial court upon application therefor and notice to adverse party. Notice of such being filed and notice of payment of compensation benefits shall be served upon the compensation carrier and upon all parties to the suit, or their attorneys of record.

(b) If the employer or insurance carrier has given written notice of his rights of subrogation to the third party tort-feasor, and, thereafter, settlement of any such claim or action at law is made, either before or after suit is filed, and the parties fail to agree on the proportion to be paid to each, the circuit court of the county in which the cause of action arose shall determine the amount to be paid to each by such third party tort-feasor in accordance with the provision of subparagraph (a) above.

[TITLE OMITTED]

WEDNESDAY, MARCH 7, 1973

On consideration of the Petition for Rehearing filed by attorneys for petitioner,

IT IS ORDERED by the Court that said petition be and the same is hereby denied.

ROBERTS, Acting Chief Justice, BOYD, McCAIN and DEKLE, JJ., concur

ERVIN, J., dissents

A True Copy

TEST:

Sid J. White
Clerk Supreme Court.

By: /s/ Kay D. Yent, D.C.

Y

CC: Jones, Paine & Foster
(Hon. John R. Beranek)
Douglass & Michaels
(Hon. Harry Lewis Michaels)
Headley & Sudduth
Hon. Sam Daniels
Hon. Edward Perse
Preddy, Haddad, Kutner & Hardy
Hon. Richard Adams
Hon. W. P. Carter, Clerk
Hon. E. B. Leatherman, Clerk
Hon. Jack A. Falk, Judge

(THE ORDER OF JANUARY 22, 1973 HAS BEEN MAILED TO THE CLERK OF THE THIRD DISTRICT COURT OF APPEAL.)

App. 5

[TITLE OMITTED]

MONDAY, JANUARY 22, 1973

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

ROBERTS, Acting Chief Justice, BOYD, McCAIN and DEKLE, JJ., Concur

ERVIN, J., Dissents

A True Copy

TEST:

Sid J. White
Clerk Supreme Court.

/s/ Dave Lang, Jr.

DAVE LANG, JR.
Chief Deputy Clerk
Supreme Court of Florida

W

cc: Hon. William P. Carter, Clerk
Hon. John R. Beranek
Hon. Edward A. Perse
Messrs. Preddy, Haddad, Kutner & Hardy
Hon. Sam Daniels
Messrs. Headley & Sudduth
Hon. Richard B. Adams
Hon. E. B. Leatherman, Clerk
Hon. Jack A. Falk, Judge

[TITLE OMITTED]

Opinion filed April 4, 1972.

Appeals from the Circuit Court for Dade County, Jack A. Falk, Judge.

Jones, Paine & Foster and John Russell Beranek (West Palm Beach); Horton, Schwartz & Perse, for appellant.

Headley & Sudduth; Sam Daniels; Preddy, Haddad, Kutner & Hardy, for appellees.

Before BARKDULL, C.J., and PEARSON and CHARLES CARROLL, JJ.

PER CURIAM.

These consolidated appeals are from the same order of equitable proration which apportioned the amount of a personal injury settlement agreement pursuant to Fla.Stat. §440.39, F.S.A. The appellant is the workmen's compensation carrier for the injured minor appellee.

Three points are argued. The first urges that the order must be reversed because the procedure followed in the trial court was improper. We agree that the procedure was not in accord with the statute and the case law concerning the subject; nevertheless, we hold that no reversible error has been demonstrated since the appellant participated without objection in the conference, which served as a substitute for the prescribed hearing. Appellant stipulated with appellees to submit the matter to the trial judge without formal

proceedings. Appellees substantially changed their positions in reliance upon appellant's apparent agreement to that procedure. Appellant is now estopped to change its position simply because it is dissatisfied with the result. See Jones v. Life Insurance Company of Florida, Fla.App. 1968, 215 So.2d 889; Walker v. Narose Bldgs., Inc. Fla. App.1968, 206 So.2d 400.

Appellant's second and third points essentially question the amount of the apportionment. No error is shown. See Hardware Mutual Insurance Company v. Roth, Fla. App.1969, 222 So.2d 768.

Affirmed.

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in the
Supreme Court
of the
United States
OCTOBER TERM, 1973

No. 72-1635

THE OHIO CASUALTY GROUP,
Petitioner,

vs.

JAMES C. PARRISH, et al.,
Respondents.

BRIEF OF PARRISH RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

Petitioner prays that a writ of certiorari issue to review the judgment below of the District Court of Appeal of Florida, Third District.*

*Since the Florida Supreme Court denied review, certiorari, if issued by this Court, would be directed to the intermediate appellate court, the Third District Court of Appeal. *E.g., Conner v. Butler*, 361 U.S. 29. The record references in this brief refer to the record in the Third District Court of Appeal and are given in the event that petitioner elects to have the record transmitted under Rule 21.

OPINIONS BELOW

The decision of the District Court of Appeal of Florida, Third District, is reported at 260 So.2d 550 and is reproduced at pages 6-7 of the Appendix to the Petition. The order of the Supreme Court of Florida denying certiorari, dated January 22, 1973, is unreported and reproduced at page 5 of the Appendix to the Petition. The order of the Supreme Court of Florida, dated March 7, 1973, denying the petition for rehearing is also unreported and is reproduced at page 4 of the Appendix to the Petition.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3). The order of the Supreme Court of Florida denying certiorari was rendered on March 7, 1973, when the petition for rehearing was denied. Accordingly, the judgment of the Third District Court of Appeal did not become final until March 7, 1973.

QUESTIONS PRESENTED

Petitioner claims that the questions presented are as follows:

> "WHETHER PETITIONER INSURANCE CARRIER WAS DEPRIVED OF THE CONSTITUTIONAL GUARANTEE OF DUE PROCESS BY LACK OF A TIMELY AND PROPER NOTICE OF THE CONFERENCE AT WHICH PETITIONER'S RIGHTS TO EQUITABLE PRORATION OF THE SETTLEMENT AMOUNT WERE CONSIDERED?

WHETHER THE HEARING PROCEDURE MET THE STANDARDS OF DUE PROCESS IN THAT NO WITNESSES WERE PRESENTED, NO EVIDENCE TAKEN AND DUE TO THE COURT'S DECIDING OF ALL ISSUES BASED SOLELY ON THE ARGUMENT OF COUNSEL?

WHETHER THE GUARANTEE OF DUE PROCESS OF LAW WAS VIOLATED BY THE ABSENCE OF SUBJECT MATTER JURISDICTION?"

Respondent contends that the record of the cause is such that none of the questions petitioner seeks to raise are presented by the record or properly before the Court.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in Section 1:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On September 7, 1970, the minor respondent James C. Parrish, Jr., sustained severe personal injuries in a Florida intersection accident. (R. 27-31).

TRIAL COURT PROCEEDINGS

On September 25, 1970, suit was brought on the minor's behalf in the Dade County Circuit Court to recover for such injuries (R. 1-3) which rendered him "a complete quadriplegic" (R. 13). After extensive discovery and numerous pretrial conferences (R. 66-93, 111-173, 179-198, 200-219) the case was specially set for trial on August 23, 1971.

On the eve of trial and after respondents' counsel felt that a serious liability problem had developed, the defendants offered $1,695,000 to settle the case (R. 298). To facilitate the settlement, respondents' counsel agreed to reduce their fee (R. 293, 309) and the only thing standing in the way of the settlement was to work out an acceptable payback with the minor respondent's workmen's compensation carrier, the petitioner, which had a lien on any settlement proceeds. With this objective in mind, counsel for the parties appeared before the trial judge on the Friday before trial was to start (R. 279-325).

When the parties first met before the trial judge, an informal discussion ensued regarding possible settlement of the comp lien (R. 281-289). It soon become apparent that respondents' counsel could not agree on a payback figure with Mr. Kuvin, trial counsel for the petitioner. At this juncture, the question arose as to whether the

parties would go forward with an equitable proration hearing under F.S.A. 440.39 so the trial court could resolve the matter. Counsel for the petitioner objected because respondents' counsel was about to testify as an expert as to the value of the case assuming admitted liability and petitioner's counsel had not had a chance to explore the matter with other experts (R. 295). Respondents' counsel met the objection by offering to withdraw the proposed expert testimony—**at which point trial counsel for the petitioner accepted the offer and agreed to continue with the hearing** (R. 295-296).

Since the petition is bottomed on the false premise that petitioner's rights were determined over its objection and without notice or opportunity to be heard, we wish to dwell on the portions of the record which refute this claim. At page 295 of the record, respondents' trial counsel was called as a witness and asked if he had any opinion as to what the case was worth if it was a case of admitted liability. Mr. Kuvin, petitioner's trial counsel, objected and the following occurred:

> "MR. KUVIN: Your Honor, I would object to that.
>
> Mr. Headly is the plaintiffs' attorney, obviously, and therefore I do not think that his opinion would be a valid opinion.
>
> THE COURT: Overruled.
>
> Go ahead. I accept that it is an attorney's opinion.

MR. KUVIN: Let me ask one thing further.

Are we now formally having a pro rata distribution here? That is what I want to know about it.

Is that the Court's ruling?

THE WITNESS: I do not see how we get out of it. We are looking Monday morning in the eye.

THE COURT: Do you have any objection?

MR. KUVIN: I would object, because if you are going to use the formula that is set forth in the book you now have before you, and testimony is to be taken of Mr. Headly, I have not been given any opportunity of determining from, for instance, Mr. Adams or Mr. Pyszka, or some other defense attorney or some other attorney.

For instance, if you are going to use Joe Headley's testimony as to what he thinks the value of the lawsuit is, I have no counter-testimony. I have been given no opportunity.

THE COURT: Do you want Mr. Adams to give an opinion?

MR. KUVIN: I have not conferred with him, and I do not know what his opinion is.

I do not think that is fair to this carrier, who is looking down the throat of a half a million dollars.

MR. DANIELS: Is your objection to proceeding the same as we withdraw the offer in his testimony?

> Are you going to go forward if I do not ask him for an opinion?
>
> MR. KUVIN: **I will go forward, yes, because my carrier, frankly, would like to know what is facing us as far as what the Court's going to rule on."** (R. 294-296).

With all parties before the trial court and with all of the parties having requested and agreed to a determination of their rights, the trial court heard the evidence and ordered respondents to pay $20,000.00 of the settlement proceeds to petitioner in satisfaction of its compensation lien.

Petitioner's claim that no evidence was taken at the agreed hearing does not comport with the record. At page 292 of the record, the parties stipulated that in making the equitable proration the trial court could consider the entire court file "including all exhibits". On the next page of the transcript (R. 293), petitioner's counsel likewise stipulated that respondents' counsel had reduced their contract fee of 40% to a third "to effectuate the settlement" and had incurred costs of some $30,000.00.

The case was settled for $1,695,000.00 (R. 297-298, 326-327). It was stipulated that petitioner had paid $70,000.00 in past comp benefits (R. 318). As to possible future benefits, petitioner's counsel offered the summary statement of counsel for one of the defendants, Mr. Adams, as to what the discovery depositions showed and expected trial testimony would be regarding the minor respondent's life expectancy and cost of medical maintenance (R. 318-319, 303-306). Some of the doctors believed

the boy would live only four or five years or even less (R. 304). Other doctors thought that, assuming he got over his present problems, he could live for 15-25 years (R. 304). These experts likewise estimated his annual medical maintenance costs at from $16,000-$20,000.00.

The only area in which evidence was not presented concerned opinion evidence as to what respondents' total damages were. Such evidence was not offered because petitioner's counsel objected that he could not get a witness for same on such short notice and did not think such evidence was proper anyway (R. 296, 317-318).

Finally, the presentation of evidence concluded when petitioner's counsel announced that he had no further evidence which he wished to offer. The record in this regard reads as follows:

> "MR. DANIELS: Do you have anything else you want to offer in the way of evidence?
>
> MR. KUVIN: **No, other than Mr. Adams' statement as to what the future will bring. . . .**" (R. 318).

After hearing all of the evidence that anyone cared to present and after hearing extensive argument on the issues, the trial court ruled that $20,000.00 should be paid back to the petitioner (R. 323-324). After this ruling, the case was settled and on the following Monday the order of equitable proration affirmed below was entered which provides:

> "THIS CAUSE having been settled by and between the parties and an equitable proration

hearing been held under F.S.A. 440.39, and the Court having considered the evidence and the arguments of the parties, it is hereby,

ORDERED that THE OHIO CASUALTY GROUP, a foreign corporation, have and recover the sum of Twenty Thousand ($20,000.00) Dollars from plaintiffs, . . ." (R. 326).

APPELLATE PROCEEDINGS BELOW

On appeal to the District Court of Appeal of Florida, Third District, the equitable proration order was affirmed, the court saying:

"These consolidated appeals are from the same order of equitable proration which apportioned the amount of a personal injury settlement agreement pursuant to Fla.Stat. §440.39 F.S.A. The appellant is the workmen's compensation carrier for the injured minor appellee.

Three points are argued. The first urges that the order must be reversed because the procedure followed in the trial court was improper. We agree that the procedure was not in accord with the statute and the case law concerning the subject; nevertheless, we hold that no reversible error has been demonstrated since the appellant participated without objection in the conference, which served as a substitute for the prescribed hearing. Appellant stipulated with appellees to submit the matter to the trial judge without formal proceedings. Appellees substantially

changed their positions in reliance upon appellant's apparent agreement to that procedure. Appellant is now estopped to change its position simply because it is dissatisfied with the result. See Jones v. Life Insurance Company of Florida, Fla.App. 1968, 215 So.2d 889; Walker v. Narose Bldgs., Inc., Fla.App. 1968, 206 So.2d 400.

Appellant's second and third points essentially question the amount of the apportionment. No error is shown. See Hardware Mutual Insurance Company v. Roth, Fla.App. 1969, 222 So.2d 768." 260 So.2d 550-551.

Thereafter, petitioner unsuccessfully sought review in the Supreme Court of Florida.

RAISING FEDERAL QUESTIONS BELOW

Petitioner admits at page 10 of its Petition that no federal questions were raised in the trial court. While petitioner attempted to raise due process claims for the first time on appeal, the Third District Court of Appeal's opinion does not decide, consider or even mention petitioner's belated due process claims or any other federal question.

REASONS FOR DENYING THE WRIT

1. No federal question was properly raised or decided below. The case of **Walker v. Narose Bldgs., Inc.**, (Fla.App. 1968), 206 So.2d 400, cited below, holds that under the Florida law matters "agreed to at trial" cannot be "raised for the first time on appeal". Florida also holds

that "Constitutional issues, other than those constituting fundamental error, are waived unless they are timely raised" and cannot be raised for the first time on appeal. **Sanford v. Rubin** (Fla. 1970), 237 So.2d 134. As this Court said in **Williams v. Georgia,** 349 U.S. 375, 382-383, "A state procedural rule which forbids the raising of federal questions at late stages in the case or by any other than prescribed method, has been recognized as a valid exercise of state power."

2. The decision below of the Third District Court of Appeal only passes on Florida law questions regarding the doctrines of consent, waiver, estoppel and equitable proration.

3. The record shows that petitioner's procedural due process claims are without merit. It consented to the trial procedures followed, waived any rights to further notice, and its rights were determined after a full and complete record had been made containing all the evidence petitioner cared to offer. It is axiomatic that "the hearing required by due process is subject to waiver." **Boddie v. Connecticut,** 401 U.S. 371, 378-379.

4. Petitioner's claim that the trial court lacked jurisdiction over the subject matter involves nothing more than a state law question concerning jurisdiction of a state trial court. Moreover, while a personal injury settlement must be made before an order of equitable proration regarding the proceeds is entered under F.S.A. 440.39, the record shows that the settlement was made before the proration order was entered. The proration order commences by stating, "THIS CAUSE having been settled. . ." (R. 326).

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari to the District Court of Appeal of Florida, Third District, should be denied.

Respectfully submitted,

SAM DANIELS
1414 duPont Building
Miami, Florida 33131
Attorney for Parrish Respondents.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that in accordance with Supreme Court Rule 33(1), three copies of the foregoing Brief have this ____ day of June, 1973, been served by mail on counsel for all parties in the cause as follows: JOHN R. BERANEK, ESQUIRE, of JONES, PAINE & FOSTER, P.A., P.O. Drawer E, West Palm Beach, Florida 33402; EDWARD A. PERSE, ESQUIRE, of HORTON & PERSE, 410 Concord Building, Miami, Florida 33130; PREDDY, HADDAD, KUTNER & HARDY, Fifth Floor, Concord Building, Miami, Florida 33130; and RICHARD B. ADAMS, ESQUIRE, of ADAMS, GEORGE & WOOD, Ninth Floor, Concord Building, Miami, Florida 33130.

SAM DANIELS